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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHEARN MOODY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether paragraph seven of 18 U.S.C. § 152, which proscribes fraudulent concealment of property "in contemplation of" bankruptcy also applies to alleged acts of fraudulent concealment occurring after the creation of a bankruptcy estate and after the appointment of a bankruptcy trustee?

2. Whether a debtor can be punished both under paragraph one of 18 U.S.C. § 152 for the concealment of estate property and also under paragraph seven of 18 U.S.C. § 152 for the simultaneous concealment of the same property charged as being "his property?"

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, addressing and rejecting petitioner's challenge to his convictions, is reported as *United States v. Moody*, 923 F.2d 341 (5th Cir. 1991) (App. A, pp. 1a-23a).

JURISDICTION OF THIS COURT

The judgment below was entered and filed on January 15, 1991 (App. A, p. 23a) and rehearing was denied on March 12, 1991. (App. B, p. 24a). This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1254 because petitioner raised and preserved, and the United States Court of Appeals for the Fifth Circuit specifically rejected, petitioner's challenge to his convictions.

STATEMENT OF FACTS

Petitioner Shearn Moody, Jr. was convicted on a two count bankruptcy fraud indictment alleging that he fraudulently concealed $201,000.[1] This sum of money was generated by the sale of real estate in Galveston, Texas that had previously been jointly owned by members of petitioner's family. The sale took place approximately one year after petitioner filed a bankruptcy petition, and the distribution of the sale proceeds occurred months after a bankruptcy trustee was appointed to administer the affairs of the complex bankruptcy estate.[2]

Initially, the government indicted Petitioner under paragraph one of 18 U.S.C. § 152 (1990), the general bankruptcy fraud provision, for fraudulently concealing from the bankruptcy estate the $201,000 in real estate proceeds, which the indictment alleged to be property belonging to the bankruptcy estate. After the defense disclosed in a pretrial hearing that its principal defense "will be that the funds were not property of the estate at the time of the transactions alleged in the indictment," (V.14, 4)[3] a superseding indictment was returned. (App. C, pp. 25a-27a). The superseding indictment added a second count of bankruptcy fraud under paragraph seven of 18 U.S.C. § 152, and this new count alleged that the sale proceeds were "property of the debtor, SHEARN MOODY." (App. C, p. 27a).

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[1] Petitioner received concurrent five year sentences on each count but consecutive fines of $5,000. Petitioner was released from prison in May 1991.

[2] *See generally, United States v. Moody*, 923 F.2d 341, 343-44 (5th Cir. 1991). Petitioner's bankruptcy proceedings have been pending since June 1983. By all accounts, the Moody bankruptcy proceedings have been complex and the proceedings have addressed millions of dollars in disputed assets and claims.

[3] Transcript Volume 14, at page four. The record below is cited in accordance with the format employed in the Fifth Circuit.

Petitioner moved to dismiss the superseding indictment on the ground that the superseding indictment's simultaneous characterization of the sale proceeds as belonging to both the bankruptcy estate and the debtor was conflicting and inconsistent. Petitioner contended that these different allegations, as essential elements of the two counts, were mutually exclusive because once a bankruptcy case commences, almost all of a debtor's property is vested in the bankruptcy estate. Thereafter, property belongs either to the bankruptcy estate or to the debtor, but cannot, as a legal matter, simultaneously belong to both.

Petitioner's confusion over how the $201,000 could simultaneously be property of the bankruptcy estate and also "his" property prompted requests for a bill of particulars, and for dismissal of the facially incompatible allegations. The district court denied all such defense requests for relief, and the jury returned a verdict of guilt on both counts. The Fifth Circuit affirmed, holding that, (i) paragraph seven of 18 U.S.C. § 152 is not limited to the fraudulent concealment or transfer of a debtor's property undertaken "in contemplation of" a bankruptcy proceeding, and (ii) paragraph seven is broad enough to authorize prosecutions for the fraudulent concealment of bankruptcy estate property, an offense also prohibited under paragraph one of section 152.[4]

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[4] The Fifth Circuit observed *in dicta* that the charging practice complained of here may be multiplicitous. *Moody*, 923 F.2d at 348. The Fifth Circuit's holding—that petitioner was properly charged and punished for two distinct statutory offenses (¶ 1 & ¶ 7 of § 152) for the same act of concealment—precludes a finding of multiplicity, the improper charging of a single offense in separate counts. *See* 1 C. Wright, Federal Practice and Procedure, Criminal 2d § 142 (1982).

ARGUMENT

I. UNDER THE BANKRUPTCY FRAUD STATUTE, 18 U.S.C. § 152, A DEBTOR MAY NOT BE SUBJECTED TO CUMULATIVE PUNISHMENT FOR THE SIMULTANEOUS CONCEALMENT OF THE SAME ASSET ALLEGED TO BE BOTH DEBTOR'S PROPERTY AND PROPERTY OF AN ESTABLISHED BANKRUPTCY ESTATE.

In the proceedings before the district court and the Fifth Circuit, petitioner repeatedly objected to being prosecuted for two counts of bankruptcy fraud charging separate offenses under 18 U.S.C. § 152, for concealing the same property during the same time period. Petitioner contends that Congress enacted separate offenses in 18 U.S.C. § 152 for the crime of fraudulent concealment of assets because it intended to prohibit *separate types* of misconduct. Under paragraph seven of 18 U.S.C. § 152, Congress proscribed the fraudulent concealment or transfer of a debtor's property *prior to* the filing of a bankruptcy petition so as to defeat the purposes of bankruptcy administration. In contrast, paragraph one of 18 U.S.C. § 152, prohibits the *post-filing* concealment of the property of a debtor's established bankruptcy estate from court officers charged with administration of that estate. Here, petitioner was convicted under both paragraph one and paragraph seven of 18 U.S.C. § 152, for the same alleged post-petition act of fraudulent concealment.

As the Fifth Circuit acknowledged, the statutory issue raised by defendant's prosecution "appears to be an issue of first impression." *Moody*, 923 F.2d at 341. (App. A, p. 10a). While the issue involves a narrow question of statutory interpretation, its resolution by the court below creates fundamental and recurring ambiguities about the appropriate scope of the principal federal bankruptcy fraud statute, 18 U.S.C. § 152.

Specifically, the Fifth Circuit has held that a debtor who has filed for bankruptcy can be twice punished for a single post-filing act of fraudulent concealment; this result was upheld by the Fifth Circuit under the unprecedented theory that the same property can simultaneously be classified as property of an existing bankruptcy estate under paragraph one of 18 U.S.C. § 152, and also as property belonging to the debtor under paragraph seven of 18 U.S.C. § 152, so that its fraudulent concealment violates both separate proscriptions. Petitioner submits that this incongruous construction of 18 U.S.C. § 152 does violence to the plain language of that statute and also to the Bankruptcy Code, where property is appropriately classified as belonging either to an established bankruptcy estate or to the debtor, but never as simultaneously belonging to both.

The breadth of the Fifth Circuit's holding is obvious; every alleged act of fraudulent concealment in an established bankruptcy proceeding can now give rise to two separate criminal offenses. The first count, as here, will be a charge that the defendant fraudulently concealed property which belongs to the existing bankruptcy estate. The second count, as here, will be a charge that the defendant fraudulently concealed the same property even though it did not belong to the bankruptcy estate, but rather belonged to the defendant debtor. Thus, defendants will be tried upon dual charges which depend on mutually exclusive categorizations of the property allegedly concealed—estate property for purposes of 18 U.S.C. § 152, ¶ 1, and debtor property for purposes of 18 U.S.C. § 152, ¶ 7.[5]

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[5] The facts of this case illustrate the tactical advantages a prosecutor can gain by making such charges. A possible defense to concealment charges under paragraph one of section 152 is that the property allegedly concealed was not property of the bankruptcy estate. Conversely, a defense under paragraph seven of section 152 is that the property was not debtor property. By charging that the property is simultaneously property of both the debtor and the

The need for precision in the criminal enforcement of the bankruptcy laws, as well as the more basic need to preserve the fundamental distinction in the Bankruptcy Code between property that belongs to an existing bankruptcy estate versus a debtor's property excludable from that estate justifies this Court's review of this dramatic and unwarranted judicial expansion of the criminal bankruptcy fraud statute.

A. Paragraph Seven of 18 U.S.C. § 152 Prohibits Only Fraudulent Transfers or Concealment Prior to the Establishment of a Bankruptcy Estate.

The Fifth Circuit rejected petitioner's contention that paragraph seven of section 152 applies only to acts of fraudulent concealment of property which occur *before* the filing of a bankruptcy petition and the appointment of a bankruptcy trustee. Petitioner argued below that post-filing concealment misconduct falls within the prohibition of § 152, ¶ 1, and that paragraph explicitly applies only to fraudulent concealment of estate property. The object of § 152, ¶ 7, on the other hand, is the fraudulent concealment or transfer of a debtor's property *prior to* the creation of a bankruptcy estate with intent to defeat the ensuing bankruptcy administration. The Fifth Circuit disagreed, holding that paragraph seven's reference to "his property" concealed "with intent to defeat the provisions of Title 11" expanded its reach to both pre- and post-filing concealment of property.

Petitioner submits that the Fifth Circuit's broad construction is at odds with the text and legislative history of paragraph seven. *Compare, Farrey v. Sanderfoot*, No. 90-350, slip. op. 1991 WL 83070 (U.S. May 23, 1991) (Court looks to text, history, and purpose of Bankruptcy Code provision to construe meaning.) More important,

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established bankruptcy estate, the defendant must abandon these defenses, or concede one of these mutually exclusive characterizations of the property.

the Fifth Circuit's opinion will cause confusion and uncertainty in the administration of the bankruptcy laws, as debtors will now face criminal prosecution under § 152, ¶ 7 for post-filing conduct even if their conduct relates solely to property properly excluded from the bankruptcy estate.

Paragraph seven of section 152 expressly prohibits any individual from knowingly and fraudulently transferring or concealing "his property" when done "in contemplation of a case under Title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of Title 11" App. D, pp. 28a-29a. The predecessor to paragraph seven was first enacted in 1926, and it has survived intact with only one relevant modification since that time. *See* Bankruptcy Act of 1898, § 29(b)(6), *amended by* Law of May 27, 1926, ch. 406, § 11, 44 Stat. 665.[6] In 1960, the statute was amended so as to apply to individual debtors in addition to corporate debtors. To do so, Congress added the term "individually" to clarify that individuals were now included within the scope of paragraph seven and changed the language which had proscribed the fraudulent concealment or transfer of "any of the property of such person" to language proscribing the fraudulent concealment of "his property." *See* Act of Sept. 2, 1960, Pub. L. No. 86-701, 74 Stat. 753.

In the proceedings below, it was uncontested that defendant Moody was charged with violating both paragraph one and paragraph seven of section 152 for alleged concealment that took place more than one year after the establishment of petitioner's bankruptcy estate, and months after the appointment of a bankruptcy trustee to administer the estate. Upon the filing of a bankruptcy petition, all of a debtor's assets are conveyed pursuant to

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[6] *See* App. E. pp. 33a-34a. In 1948, the bankruptcy fraud provisions were deleted from the Bankruptcy Code and were enacted in essentially the same form as chapter nine of title 18, which includes 18 U.S.C. § 152. *See* Law of June 25, 1948, ch. 645, 62 Stat. 689.

11 U.S.C. § 541(a)(1) to the created bankruptcy estate. *Matter of Goff*, 706 F.2d 574, 578 (5th Cir. 1983). As explained by the Senate and House Judiciary Committee reports which accompanied the comprehensive revisions of the Bankruptcy Reform Act of 1978,[7] "Once the estate is created, no interests in property of the estate remain in the debtor." S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 368 (1977).[8] A central issue in the petitioner's prosecution was who owned the disputed property when it was allegedly concealed more than a year after the commencement of the bankruptcy estate. The indictment's dual charges made this critical distinction an irrelevancy here because petitioner could be convicted if the property was either his or that of the bankruptcy estate.

1. *Paragraph 7 of 18 U.S.C. § 152 Should Be Construed Conjunctively.*

Paragraph seven of section 152 prohibits an individual "in contemplation of a case under Title 11 by or against him . . . *or* with intent to defeat the provisions of Title 11, [from] knowingly and fraudulently transfer[ing] or conceal[ing] any of *his* property." (emphasis added). App. D, p. 29a. Seizing upon the word "or," the Fifth Circuit held that the two adjoining phrases must be construed in the disjunctive, thus permitting a prosecution solely for concealment "with intent to defeat the provisions of Title 11" even if the concealment takes place after the commencement of the bankruptcy. Petitioner submits that the adjoining phrases in paragraph seven should be construed conjunctively, meaning that paragraph seven applies to fraudulent concealment or transfer of assets "in contemplation of a case under Title 11," and "with intent to defeat the provisions of Title 11." The

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[7] Pub. Law 95-598, 92 Stat. 2549. A copy of § 541 is reproduced at App. D, pp. 30a-32a.

[8] *Accord, Bryson v. Bank of New York*, 584 F. Supp. 1306, 1315 (S.D.N.Y. 1984); *In re Strangis*, 67 B.R. 243, 246 (Bankr. D. Minn. 1986); *In re Flaten*, 50 B.R. 186, 190-91 (Bankr. D.N.D. 1985).

Fifth Circuit's contrary interpretation renders the more specific post-filing provisions of paragraph one of section 152 duplicative of this far more general language in paragraph seven.

The entirety of section 152 is derived from the Bankruptcy Code.[9] Petitioner submitted to the courts below a harmonizing interpretation of section 152's alternative provisions, one compatible with the intended overall coherency and consistency of the Code. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). In rejecting this interpretation, the Fifth Circuit disregarded the plain facial meaning of section 152 and its legislative history in favor of an interpretation which injects inconsistency and a lack of coherency into section 152.

This Court in *McNally v. United States*, 483 U.S. 350 (1987), interpreted two adjoining clauses in the federal mail fraud statute in the conjunctive even though they were separated by the term "or." In reaching this conclusion, this Court consulted the legislative history of the pertinent statute, and applied traditional principles of lenity to the construction of a criminal statute. Here, the legislative history unequivocally establishes that paragraph seven was intended to protect against fraud "*before* trustees have been appointed," S. Rep. No. 774, 68th Cong., 1st Sess. 5 (1924) (emphasis added). This limited scope for paragraph seven was reaffirmed in 1960 when paragraph seven was expanded at the urging of the Attorney General to apply to indivdual debtors. *See*, S. Rep. No. 974, 86th Cong., 2d Sess. 3307, 3309 ("The proposed legislation is designed to make individuals who conceal or transfer assets in contemplation of their own bankruptcy subject to the same prosecution as is now provided for agents or officers.") [10] Indeed, Attorney General Rogers, in submitting his proposed amendment to

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[9] See note 6, *supra*.

[10] The pertinent legislative history of this 1960 Amendment is reproduced at App. E, pp. 35a-39a.

Congress in 1960 also agreed that paragraph seven applies only to acts taken in contemplation of bankruptcy.[11]

Moreover, the unique presence of the term "his property" in paragraph seven to describe the type of property concealed also counsels in favor of a conjunctive reading. The term "his property" modifies both clauses of paragraph seven, and thereby limits the application of paragraph seven to property owned by the debtor. The only time that a debtor could fraudulently conceal or transfer his own property is prior to the commencement of a bankruptcy estate; upon the commencement of a bankruptcy, *all* of a debtor's property is vested in the bankruptcy estate, and the only property that a debtor may thereafter own is that which is excluded from the bankruptcy estate by operation of the Bankruptcy Code. A debtor's post-filing use of property excluded from the bankruptcy estate cannot prejudice the interests of creditors, and is not the proper subject of a criminal bankruptcy fraud enforcement action under 18 U.S.C. § 152, ¶ 7. Moreover, such an interpretation introduces a de-

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[11] In his letter submitting the proposed amendment to Congress, Attorney General Rogers explained:

> Paragraph 1 of section 152 subjects bankrupts to prosecution for the concealment of assets. However, the law is well established that in such a prosecution, the Government must prove that the assets were concealed after the appointment of a trustee or receiver.
>
> On the other hand, paragraph [7] of the section prohibits officers and agents of potential bankrupts from concealing the assets of such persons or corporations in contemplation of bankruptcy—*before the appointment of a trustee or receiver.*
>
> It would seem that individuals who dispose of their property in contemplation of their own bankruptcy should be held to the same degree of accountability as agents or officers of others who are potential bankrupts.
>
> The attached draft legislation would strengthen the statute while removing the inequity now inherent in it.

1960 U.S. Cong. & Admin. News at 3308-09 (emphasis added) (a copy of which is reproduced at App. E, p. 37a).

gree of uncertainty and imprecision over one of the most central factors in administration of a bankruptcy estate —what property belongs to the estate.

2. *Even if Construed Disjunctively, 18 U.S.C. § 152, ¶ 7 Does Not Apply to Post-Petition Conduct by a Debtor.*

As previously discussed, a debtor's *fraudulent* concealment of "his property" can only occur before the creation of a bankruptcy estate; once the estate is created, any property fraudulently concealed would be property of the bankruptcy estate.[12] The original fraudulent concealment statute, paragraph one of section 152, plainly applies to such post-filing fraudulent conduct, as, unlike paragraph seven, it expressly proscribes concealment of "property belonging to the estate of a debtor." App. D, p. 28a.

The temporal difference between the operation of paragraphs one and seven of section 152 is further revealed by the fact that paragraph one speaks of fraudulent concealment from a bankruptcy trustee or "other officer of the court"—something that can occur only upon commencement of a bankruptcy case. The absence of any similar reference to a bankruptcy trustee or "other officer of the court" in paragraph seven is reflective of the fact that Congress intended that paragraph seven apply *before* the commencement of a bankruptcy proceeding.

In summary, the plain meaning of paragraph seven of section 152, its relationship to paragraph one, its legislative history, the structure of the Bankruptcy Code and principles of lenity all lead to the conclusion that Congress crafted its language to reach only pre-filing fraudulent conduct of a debtor. Accordingly, on the undisputed

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[12] *Cf.* 11 U.S.C. § 727(a) (distinguishing between pre-filing property of the debtor and post-filing property of the estate for purposes of denying bankruptcy discharge based on fraud).

facts here, the lower courts erred in upholding defendant's conviction under paragraph seven for conduct that occurred after the commencement of petitioner's bankruptcy proceeding and after the appointment of a bankruptcy trustee.

B. The Fifth Circuit Erred in Interpreting 18 U.S.C. § 152 ¶ 1 To Be Duplicative of 18 U.S.C. § 152, ¶ 7.

According to the Fifth Circuit, petitioner was appropriately convicted of two counts of bankruptcy fraud for the fraudulent concealment of the same property because his conduct allegedly violated both paragraph one and paragraph seven of 18 U.S.C. § 152. The Fifth Circuit's holding is at odds with the plain language of these two different offenses, is not reconcilable with their completely different legislative histories, and is incompatible with the Bankruptcy Code. More important, the Fifth Circuit's holding promises to cause great mischief in the civil and criminal enforcement of the bankruptcy laws.

Paragraph one of section 152 prohibits the knowing and fraudulent concealment of "any property belonging to the estate of a debtor" from a "trustee . . . or other officer of the court charged with the control or custody of property . . . in any case under Title 11." In short, paragraph one proscribes the concealment of property from a bankruptcy trustee appointed to administer the debtor's bankruptcy estate. Paragraph one is the oldest bankruptcy fraud provision, and it can be traced back to essentially identical language in the Bankruptcy Act of 1898. *See* Law of July 1, 1898, ch. 541, § 29b, 30 Stat. 554 (repealed 1978).

Under Count Fourteen of the superseding indictment, the government alleged that the property belonged to the petitioner's bankruptcy estate, and therefore petitioner's alleged concealment of it "from the bankruptcy trustee" violated paragraph one of section 152. App. C, p. 25a-

26a. Conversely, under Count Fifteen, the government alleged that this same property was fraudulently concealed because it was "property of the debtor, Shearn Moody." (App. C, p. 27a). Petitioner repeatedly objected to these conflicting allegations. Petitioner contended that, upon the filing of a bankruptcy, property belongs to the established bankruptcy estate or it is excluded from that estate and belongs to the individual debtor, but it cannot simultaneously be both, as alleged in the indictment here.

The Fifth Circuit disagreed. According to the Fifth Circuit, the term "his property" in paragraph seven of section 152 is not a reference to a debtor's property. 923 F.2d at 347. (App. A, pp. 9a-10a) Instead, the Fifth Circuit held that the term "his property" is broad enough to include assets of a bankruptcy estate, and that therefore petitioner was consistently convicted of concealing both "his property" under paragraph seven and concealing the same property as belonging to the bankruptcy estate under paragraph one of section 152.

The Fifth Circuit reached this flawed conclusion by interpreting the absence of the phrase "property of the debtor" in paragraph seven of section 152 as signifying that the term "his property" used therein does not refer to debtor property.[13] Accordingly, the Fifth Circuit upheld petitioner's dual convictions on the ground that his convictions under Count One (a § 152, ¶ 1 violation for concealment of estate property) and Count Two (a § 152, ¶ 7 violation for concealment of "his property") are "consistent" with one another. *Id.* at 347. In so doing, the court offered no explanation of why the different criminal concealment provisions of the Bankruptcy Code could contemplate dual punishment for the same conduct.

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[13] In addition, the Fifth Circuit held that the indictment's characterization of the paragraph seven violation as involving the concealment of "property of the debtor" was aslo not controlling, and it was free to disregard this allegation of an essential element in the indictment because of the court's contrary statutory interpretation of 18 U.S.C. § 152, ¶ 7. 923 F.2d at 346.

The Fifth Circuit erred in its interpretation of paragraphs one and seven of section 152, and has essentially construed these two separate offenses as though they proscribe the same offense. In the first place, the *absence* of the term "property of the debtor" in paragraph seven is not as pertinent as the *presence* of the term "his property" in that paragraph. The unique term "his property" in paragraph seven is clearly a designation of the type of property for which criminal liability can attach if fraudulently concealed. The term "his property" as used in paragraph seven does not appear in any of the remaining eight paragraphs of section 152. In addition, the term "property of the debtor" [14] *was the precise language Congress used in paragraph seven's predecessor provisions to define a violation*, and the term "his property" is merely the reformulation of this predecessor language prompted by the 1960 amendments to paragraph seven; [15] hence, the term "his property" must be construed to be a reference to a debtor's property, and not —as the Fifth Circuit concluded—as a reference to estate property.

Indeed, the fact that Congress amended the fraud provisions of the 1898 Bankruptcy Act in 1926 to *add* this new offense for concealment of "property of the debtor" as opposed to the existing prohibition in paragraph one proscribing fraudulent concealment of "property belonging to the estate of a debtor" underscores the fact that Congress intended to create a different offense—one that addressed the fraudulent concealment of a debtor's individual property, and not estate property. *See* App. E, p. 33a-34a. Congress did not, in 1926, create a new offense in paragraph seven only to proscribe that which was previously prohibited in paragraph one as enacted in 1898. Indeed, the absence of the term "property belong-

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[14] The term "property of a debtor" does not appear in any paragraph of section 152.

[15] *See, e.g.*, Law of July 1, 1898, ch. 541, § 296, 30 Stat. 554, *as amended by* Law of May 27, 1926, ch. 406, § 11(b)(6), 44 Stat. 665. A copy of the 1926 amendment is reproduced at App. E, p. 33a-34a.

ing to the estate of a debtor" from paragraph seven, and its presence in paragraph one, is persuasive evidence that these terms are not synonymous. If Congress had intended to make paragraph seven reach fraudulent concealment or transfer of estate property, then it could have used that designation, as it did previously in paragraph one of section 152.

The Fifth Circuit's disregard of this clear legislative history introduces an anomaly into the provisions of the Bankruptcy Code which cannot be tolerated. The obscuring of so central a Code concept as the nature and temporal limits of the bankruptcy estate runs counter to the need for a consistent and clear construction of the Bankruptcy Code and introduces unnecessary confusion and a lack of predictability to the bankruptcy process. If accepted, the Fifth Circuit's interpretation leaves creditors uncertain as to the boundaries of the bankruptcy estate, and forces them to guess if property is that of the debtor, the bankruptcy estate, or both.

Most compelling however, are the consequences of this confusion for criminal enforcement of the bankruptcy laws. Given that bankruptcy filings have almost doubled within the last five years,[16] this Court can expect increased criminal enforcement of the Bankruptcy Code. This enforcement will require certainty and precision in the interpretation of section 152. This Court should adopt the harmonizing interpretation of section 152 supported by its plain language and legislative history, and should reject the lower court's efforts to blur any distinction between section 152's multiple criminal prohibitions.

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[16] Administrative Office of the United States Courts, Revised Bankruptcy Statistical Information 3 (May 2, 1991) ("During the last five years, total bankruptcy filings nationwide have nearly doubled.")

CONCLUSION

For the foregoing reasons, we respectfully urge that the writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-6271

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SHEARN MOODY, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Jan. 25, 1991

Samuel J. Buffone, Terrance G. Reed, Asbill, Junkin, Meyers & Buffone, Washington, D.C., for Shearn Moody.

Sean Connelly, Atty., Appellate Section, Crim. Div., U.S. Dept. of Justice, Washington, D.C. Henry K. Oncken, U.S. Atty., Paula Offenhauser, Asst. U.S. Atty., Houston, Tex., Sidney Glazier, Atty., Appellate Section, Crim. Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Before RUBIN, SMITH, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

Shearn Moody, Jr. (Moody), appeals his convictions for: (1) concealing property belonging to his bankruptcy estate, in violation of 18 U.S.C. § 152 ¶ 1 (Count 1); and (2) subsequent to the initiation of his bankruptcy proceeding, concealing his property with intent to defeat the

provisions of title 11, in violation of § 152 ¶ 7 (Count 2). Primarily at issue are whether the charges are inconsistent, requiring reversal, and whether § 152 ¶ 7 applies only to pre-bankruptcy petition activity. While the Counts may have been multiplicitious (an issue not before us), they were not inconsistent; and, by its plain terms, ¶ 7 applies to both pre- and post-petition activity. We AFFIRM.

I.

Shearn Moody's father died in 1936, when Moody was two years of age, leaving substantial trusts to both Moody and his brother, Robert Moody. Each trust included a three-eighths interest in the Beach Corporation (Beach). Moody's mother owned the remaining one-quarter interest. Beach owned the property in issue, real estate known as Outlot 162 in Galveston, Texas. In December 1963, Beach deeded Outlot 162 to Moody, Robert Moody, and their mother, as individuals.

That month, Moody, Robert Moody, and their mother, as general partners, formed the Seaside Lanes partnership to own and manage the properties owned individually by the Moodys or by the trusts of Moody or Robert Moody. In the partnership agreement, Moody, Robert Moody, and their mother transferred their interests in Outlot 162 to the partnership. A motel had been built on a portion of Outlot 162; the partnership constructed a bowling alley on the property. In June 1984, the partnership sold the bowling alley for approximately $500,000.[1] The sale proceeds were invested in a certificate of deposit (CD) at Moody National Bank and totalled over $500,000 at maturity in December 1984.

In the interim, Moody had established an insurance company, which was placed in receivership in 1972. One

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[1] In 1978, the partnership sold the bowling alley, taking a $675,000 promissory note, secured by a deed of trust. The bowling alley was destroyed by a hurricane, the purchasers subsequently defaulted; and the partnership foreclosed on the property.

result of the company's demise was a civil fraud action against Moody personally, resulting in a $6 million judgment, entered January 1980, which was affirmed by this court. *Meyers v. Moody*, 693 F.2d 1196 (5th Cir.1982), *cert. denied*, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983). At that time, the judgment, including interest, totalled approximately $12 million.

In 1980, approximately three months after entry of the district court judgment, Moody created the 1980 Trust to provide a life income to a long-time employee and to maintain both the Moody family home and his ranch. The 1980 Trust was funded in part by a transfer of all of Moody's property acquired from the trust established for Moody by his father. However, Moody's interest in Outlot 162 was not conveyed to the 1980 Trust until December 29, 1982, six days after this court affirmed the judgment against Moody and six months before his first bankruptcy petition was filed.

In June 1983, Moody filed a bankruptcy petition under Chapter 13 in the Southern District of Texas. The petition was subsequently withdrawn and a similar petition filed in November 1983, in North Carolina, where Moody was receiving medical care. The Chapter 13 proceeding was converted to a Chapter 11 reorganization; and a trustee was appointed in October 1984. The North Carolina bankruptcy court transferred the proceeding to the Southern District of Texas in January 1985, and a new trustee was appointed.

Both of Moody's bankruptcy petitions listed his Seaside Lanes partnership interest as an asset of the bankruptcy estate. Moreover, in July 1984, after the partnership sold the bowling alley, Moody's attorney, Jane Ford, informed Robert Moody, Chairman of the Board at Moody National Bank, that Shearn Moody's interest in the sale proceeds (the $500,000 CD) belonged to the bankruptcy estate and warned Robert Moody that the sale might be void because it had occurred without no-

tice to the bankruptcy creditors. And, by letter that August, Ford instructed the president of Moody National Bank that the $500,000 CD should not be disbursed absent a bankruptcy court order. The North Carolina trustee likewise demanded that Moody's share of the proceeds be released to the trustee when the CD matured.

However, when the CD matured on or about December 21, 1984, Robert Moody ordered the proceeds wired to the partnership's account at the Bank of Galveston. On December 24, 1984, Shearn Moody cashed three checks totalling $201,000; they were drawn on the Seaside Lanes account, payable to Seaside Lanes, and endorsed by Shearn Moody. Moody then converted the proceeds into cashiers checks totalling $197,000. Subsequently, he cashed those checks and used the funds to buy cashiers checks in smaller amounts, which he cashed over the next several months. Moody did not inform the North Carolina bankruptcy trustee that he had taken this distribution from the partnership. In fact, the distribution and expenditure were not known to either the North Carolina or the subsequent Texas trustee until the end of July 1985, as a result of a bankruptcy deposition (Moody's) and hearing the next day (Robert Moody's testimony).

In December 1986, Moody and his employee, Norman Revie, were charged in a 14-count indictment in the Southern District of Texas. The first 13 counts charged mail and wire fraud based on a scheme unrelated to the present case; Count 14 charged bankruptcy fraud under 18 U.S.C. §§ 152 and 2. In January 1987, Moody moved to dismiss the indictment; and in July 1987, his motion to sever Count 14 from the remainder of the indictment was granted.[2] A two-count superseding indictment was

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[2] The first 13 counts were tried first under a superseding indictment. Moody was convicted, but this court reversed on the ground that certain evidence offered by Moody was improperly excluded. This court upheld the evidentiary sufficiency on all but two counts and held that retrial on the remaining counts would be permitted. *United States v. Moody*, 903 F.2d 321 (5th Cir. 1990).

filed in April 1989 (the indictment), which charged Moody with fraudulent concealment and transfer of the $201,000, in violation of 18 U.S.C. § 152 ¶ 1 (Count 1) and ¶ 7 (Count 2).

Moody's principal defenses at trial were that the $201,000 (the proceeds) was not property belonging to the bankruptcy estate and that he did not act with the requisite criminal intent. Moody claimed that the $201,000 was not his personal property; that instead, it was property held under the 1980 Trust.[3] However, as stated above, both bankruptcy petitions listed Moody's interest in the Seaside Lanes partnership as a personal asset. And, *inter alia*, the government asserted that the 1980 Trust was a sham.

In September 1989, the jury found both Moody and Revie guilty on both Counts. After being sentenced in December 1989, to concurrent five year terms of incarceration and a fine of $5,000 on each Count, Moody timely appealed.[4]

II.

Moody contends that (1) the two Counts are mutually repugnant, requiring reversal; (2) Count 2 should be dismissed, arguing that § 152 ¶ 7 pertains only to prepetition conduct; (3) the district court committed plain error in its jury instruction defining property belonging to the bankruptcy estate; (4) the indictment was insufficient; (5) the court abused its discretion in denying a bill of particulars; and (6) the court committed re-

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[3] Moody conveyed Outlot 162 into the 1980 Trust by deed dated December 29, 1982, from Moody, individually, to Moody as "trustee." The bankruptcy petitions, filed less than a year later, contained a question requiring the listing of any property transfers within the past year; Moody answered "No."

[4] Revie appealed but subsequently became a fugitive when he failed to surrender for incarceration. This court dismissed his appeal in May 1990.

versible error in admitting testimony protected by the attorney-client privilege.

A.

Moody urges reversal on the basis that the Counts are factually repugnant to each other; that there are mutually inconsistent allegations of essential elements of each Count. Simply put, Moody contends that to convict on Count 1, the jury had to find that the procedes were "property of the bankruptcy estate," but to convict on Count 2, the jury had to find that the same property (the proceeds) was "property of the debtor." Accordingly, Moody argues that "proof of Count Two necessarily establishes a defense to Count One and vice versa."

In addition, Moody argues that § 152 ¶ 7 only applies to pre-petition activity. Therefore, he contends that corresponding Count 2 must be dismissed, because the charged concealment was post-petition.

As revised by the Bankruptcy Reform Act of 1978, Pub.Law 95-598, 92 Stat. 2549, 11 U.S.C. § 101, *et seq.*, *as amended*, the Bankruptcy Code "was intended to create a more uniform and comprehensive scope to 'property of the estate' which is subject to the reach of debtors' creditors than had previously existed under the old Bankruptcy Act"; and pursuant to "Section 541 of the Code, all property in which a debtor has a 'legal or equitable interest' at the time of bankruptcy comes into the estate . . . ." *Matter of Goff*, 706 F.2d 574, 578 (5th Cir.1983).

The statutes concerning crimes relating to bankruptcy, 18 U.S.C. § 151 *et seq.*, were amended to conform to the new Code, Bankruptcy Reform Act of 1978 § 314, Pub.L. 95-598, 92 Stat. 2676. Concealment of assets is one of the subjects to which 18 U.S.C. § 152 pertains; and, as stated, Moody was charged with offenses under its first (Count 1) and seventh (Count 2) paragraphs. The first paragraph provides:

> Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor . . . [shall be fined or imprisoned or both].

The seventh paragraph provides:

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation . . . [shall be fined or imprisoned or both].

As reflected above, the first paragraph of § 152 is concerned with "property belonging to the estate of a debtor," while the seventh concerns, *inter alia*, a person who, "with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of *his property*. . . ." (Emphasis added.) For purposes of the bankruptcy criminal statutes, a "debtor" is "a debtor concerning whom a petition has been filed under title 11." 18 U.S.C. § 151. The seventh paragraph of § 152 does not employ the term "property of a debtor."

Pursuant to § 152 ¶ 1, Count 1 charged that

> [f]rom on or about December 24, 1984 . . . MOODY . . . and . . . REVIE . . . did knowingly and fraudulently conceal from a custodian, trustee, marshal, and other officer of the court charged with the control and custody of property, and from creditors, in a case under title 11, property belonging to the estate of the debtor SHEARN MOODY, JR., in that . . . MOODY . . . concealed approximately $201,000.00 which was property belonging to the estate of the debtor SHEARN MOODY, JR.

And, consistent with § 152 ¶ 7, Count 2 charged that

> [f]rom on or about December 24, 1984 . . . SHEARN MOODY, JR., individually, and NORMAN REVIE, acting as agent for SHEARN MOODY, JR., . . . did with intent to defeat the provisions of title 11, knowingly and fraudulently transfer and conceal property of the debtor, SHEARN MOODY, JR., in that SHEARN MOODY, JR. and NORMAN REVIE transferred and concealed approximately $201,000,00 from the Seaside Lanes Partnership.

Paragraph 7 speaks of "his property or the property of such other persons or corporation." Perhaps because Count 2 charged that both Moody and Revie concealed Moody's property ("property of the debtor, SHEARN MOODY, JR."), that Count did not use the statutory language "his property." In any event, Moody did not, and does not, charge that this alone renders that Count facially defective. Instead, Moody contends that the phrase "his property" in ¶ 7 is "a plain reference to a *debtor's* property as it exists prior to the filing of bankruptcy," as distinct from property of the bankruptcy estate created at the time the petition is filed. (Emphasis by Moody.)

Permitting a jury to return convictions on inconsistent, or mutually exclusive, counts arguably requires that a new trial be granted. *See, e.g., United States v. Gaddis*, 424 U.S. 544, 547, 96 S.Ct. 1023, 1025, 47 L.Ed.2d 222 (1976); *Milanovich v. United States*, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961), *Douglas v. Long*, 661 F.2d 747, 749 (9th Cir.1981), *cert. denied*, 456 U.S. 932, 102 S.Ct. 1984, 72 L.Ed.2d 449 (1982); *United States v. Chrane*, 529 F.2d 1236, 1238 (5th Cir.1976). Prior to, during, and after trial, Moody consistently, and most persistently, urged that the two Counts are inconsistent, or mutually repugnant; in the alternative, multiplicitous.

In charging the jury, the district court properly distinguished between § 152 ¶ 7 "his property" and ¶ 1

"property belonging to the estate of a debtor," by charging the jury as follows:

> It is an essential element of the offense charged under Count 2 of the indictment that the property allegedly transferred or concealed belonged to Shearn Moody, Jr. It should be noted that property belonging to Shearn Moody, Jr. may or may not be property belonging to the estate of Shearn Moody, Jr. as that term has been defined for you.
>
> The Bankruptcy Code requires a debtor to disclose all of his assets, even if the bankruptcy court later determines that a particular asset is not part of the debtor's bankruptcy estate.

And in stating the elements that must be proved to convict on Count 2, the court charged the jury that the government had to establish the following, among other elements, beyond a reasonable doubt:

> Second, that the property allegedly transferred or concealed by Shearn Moody, Jr. belonged to him. Under this statute it is not necessary for the property to be an asset of the bankruptcy estate. It is sufficient if in concealing or transferring his own property the defendant has the intent at the time of the concealment or transfer to defeat the bankruptcy law.
>
> * * * *
>
> Fourth, that by transferring or concealing the property in question, if he did so, Shearn Mody, Jr. acted with intent to defeat the bankruptcy law.

The district court's analysis and jury instruction were correct; there is no inconsistency. Paragraph 1 is concerned with concealing "property belonging to the estate of a debtor," while ¶ 7 addresses a person either "in contemplation of a case under title 11 . . ., *or with intent to defeat the provisions of title 11*," concealing "his property." (Emphasis added.) Notwithstanding the disjunc-

tive phrases in ¶ 7, Moody argues that it only concerns pre-petition activity, that "[u]pon filing a bankruptcy, *all* of a debtor's property automatically becomes part of the bankruptcy estate . . . and thus the only time at which the debtor possesses 'his property' is prior to filing for bankruptcy. Post-petition, a debtor possesses only those assets which the Bankruptcy Code excludes from the bankruptcy estate." (Emphasis by Moody.)

Needless to say, words in a statute are to be given their plain and ordinary meaning. *E.g., United States v. Chen*, 913 F.2d 183, 189 (5th Cir.1990). In ¶ 7, the phrase "with intent to defeat the provisions of title 11" is in the disjunctive to the phrase "in contemplation of a case under title 11." And, as discussed above, the paragraph does not use the term "property of the debtor." [5] Accordingly, there is no need to dissect the Bankruptcy Code. We will not give the plain wording and meaning of ¶ 17 the strained, hypertechnical reading urged by Moody.

Moreover, while this appears to be an issue of first impression, holdings in other § 152 cases, without specifically addressing this issue, support our position. *See*,

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[5] For example, prior to being amended in 1984, 11 U.S.C. § 547(b) ("Preferences") used the term "property of the debtor." It was amended to substitute "interest of the debtor in property" for that term. Pub.L. 98-353, Title III, §§ 310, 462 (July 10, 1984, effective with respect to cases filed 90 days after that date). The amended term used in Section 547(b) thus conforms with the above-referenced § 541's definition of "property of the estate" as certain "interests of the debtor in property." *See Begier v. I.R.S.*, —— U.S. ——, 110 S.Ct. 2258, 2263 & n. 3, 110 L.Ed.2d 46 (1990), where the Court noted that for the pre-1984 amended § 547(b), the Code did not define "property of the debtor." Moreover, *see* 18 U.S.C. § 3284, which provides:

> The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

e.g., United States v. Parkhill, 775 F.2d 612 (5th Cir. 1985) (debtor charged and convicted under ¶¶ 1 and 7 for post-petition activity concerning the same property); *United States v. Turner*, 725 F.2d 1154 (8th Cir.1984) (defendant was convicted under ¶ 7 for post-petition concealment).

As referenced above, and as an alternative to the contention that the Counts are inconsistent, Moody urged in the district court that the Counts are multiplicitous. As discussed, for example, in *Chrane*, counts are multiplicitous when they charge the same, or a single, offense; when, for example, they "are coterminous, in effect one offense with two labels." 529 F.2d at 1238. Multiplicity addresses double jeopardy; and where the jury is allowed to return convictions on multiplicitous counts, the remedy is to remand for resentencing, with the government dismissing the count(s) that created the multiplicity. *Id.*[6]

Here, however, Moody in his brief carefully avoids asserting that the Counts are multiplicitous. As oral argument, the government stated that while there might be multiplicity, there was no inconsistency; but Moody responded that he was not urging multiplicity, only inconsistency, presumably because, if we held the charges to be multiplicitous, this would require only that the conviction on one of the Counts be dismissed. Because the sentences were concurrent, the net result of success on

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[6] The district court was concerned about multiplicity; and when defendants moved again for acquittal after both sides rested, the court reserved ruling, pending the jury verdict, and stated:

> If the jury convicts on both [Counts], then I think I have an affirmative duty at that point to determine if in fact [the jury has] done something that would place these parties in a double jeopardy . . . circumstance. . . .

Following return of the verdict, the court denied defendants' motions for acquittal, in which it was again urged that the Counts are "fatally in conflict with one another," and, in the alternative, that the "conviction and sentencing on both counts would violate the double jeopardy clause of the Fifth Amendment. . . ."

this contention would be the elimination of one of the $5,000 fines. Instead, he seeks reversal of both convictions by arguing that the Counts are inconsistent. Accordingly, we do not address whether the Counts are multiplicitous; and, instead, hold only that they are not inconsistent and that, therefore, reversal is not required.

And, as discussed above, because ¶ 7 applies to both pre- and post-petition activity, Moody's contention that the Count 2 conviction must be dismissed is also without merit.

B.

Moody asserts that the district court erred in its jury instruction defining § 152 ¶ 1 "property belonging to the bankruptcy estate" for Count 1. Moody failed to object at trial to this instruction; accordingly, he concedes, correctly, that he must demonstrate plain error. Fed.R.Crim. P. 30; *United States v. Yamin*, 868 F.2d 130, 132 (5th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 3258, 106 L.Ed.2d 603 (1989); *United States v. Ortega*, 859 F.2d 327, 330-31 (5th Cir.1988), *cert. denied*, 489 U.S. 1027, 109 S.Ct. 1157, 103 L.Ed.2d 216 (1989); *see also* Fed. R.Crim.P. 52(b). Plain error is a mistake so fundamental that it constitutes a "miscarriage of justice." *Yamin*, 868 F.2d at 132. It "permits us 'to correct only particularly egregious errors . . . that seriously affect the fairness, integrity, or public reputation of judicial proceedings' and result in a miscarriage of *justice*." *Ortega*, 859 F.2d at 330 (citation omitted). Moreover, "[i]n determining whether a faulty jury instruction rises to the level of plain error, we do not examine the instruction in a vacuum"; we look at the charge as a whole and the closing arguments; in short, we look at the instruction "in the context of the trial as a whole." *Id.*

The salutary purposes for the plain error standard, especially in the context of failing to contemporaneously object to a proposed jury instruction—and most especially for areas of the law (bankruptcy and trusts) and a trial

as technical and precise as are involved here, are obvious. Accordingly, there must be more than error; there must be plain error—a justifiably higher, and more demanding, standard.

During trial, considerable testimony was devoted to the definition of a spendthrift trust and how such a trust, its corpus and the proceeds from it are handled in a bankruptcy proceeding, to Moody's various trusts, to which of them, if any, constituted a spendthrift trust, and to how his spendthrift trust(s) and such proceeds, if any, were handled in his bankruptcy proceeding. The instruction in issue provided:

> **"Property belonging to the bankruptcy estate"** of Shearn Moody, Jr. means any legal, equitable or beneficial interest of the debtor in property on the date the bankruptcy petition was filed or that he may have acquired after the commencement of the case other than earnings from personal services or loan proceeds. The term **"property belonging to the bankruptcy estate"** does not include property held in trust in the name of the debtor for the benefit of others, but may include any beneficial interest that the debtor may have in a trust as well as any proceeds derived from trust property. *Moreover, trust property held for the benefit of others is excluded only if the trust qualifies as a spendthrift trust.* The fact that a trust may contain a spendthrift provision does not automatically qualify it as a spendthrift trust. You may consider the motive as well as the intent and acts of the party creating the trust.

(Emphasis in italics added.) Moody asserts that the italicized portion of the charge is an incorrect statement of the law, and that, because his defense at trial was that the $201,000 was not "property of the estate" but was, instead, property of the 1980 Trust, the erroneous charge amounted to a directed verdict on an essential element of the offense and therefore constituted plain error.

During the charge conference, Moody did not object to any portion of the instruction in issue. However, after the government completed its initial closing argument, Moody did object to certain portions of the instruction; and the district court amended it accordingly. But, the objection did not concern the spendthrift language in the instruction. Instead, it concerned only changing "property of the estate" from "means *all property* in which . . . Moody held a legal, equitable, or beneficial interest," to "means any legal, equitable, or beneficial *interest* of the debtor in property," consistent with 11 U.S.C. § 541. (Emphasis added.)[7]

The exclusion, *vel non*, of a debtor's interest in or under a "spendthrift trust" from the property of the estate is covered by 11 U.S.C. § 541(c).[8] *See, e.g., Matter of Goff*, 706 F.2d at 580 ("Congress intended to exclude only trust funds in the nature of 'spendthrift trusts' from the property of the estate") and at 582 ("Congress intended by its reference [in § 541(c)(2)] to 'applicable nonbankruptcy law' to exempt from the estate only those 'spendthrift trusts' traditionally beyond the reach of creditors under state law").

Careful reading of the instruction in issue reflects—certainly for plain error purposes—that it makes a distinction between "property held in trust" and "trust property held." The court instructed that property of the estate did "not include *property held in trust* in the name of the debtor for the benefit of others, but may in-

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[7] Moody has different counsel on appeal.

[8] Section 541(c) provides in pertinent part:

> (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section. . . .
>
> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

clude any beneficial interest that the debtor may have in a trust *as well as any proceeds derived from trust property.*" (Emphasis added.) Concerning such proceeds or other property held by the debtor, such as the $201,000 in issue, the court then arguably followed up, by limiting the exclusion: "Moreover, *trust property held* [—not held in trust—] *for the benefit of others* is excluded only if the trust qualifies as a spendthrift trust." (Emphasis added.)

In addition, prior to the above definitional instruction being given, the court, instructing the jury on the elements that had to be proved beyond a reasonable doubt to convict under Count 1, included the following:

> Fourth, that Shearn Moody, Jr. knew at the time of the alleged knowing and fraudulent concealment that the approximately $201,000 from the sale of the Seaside Lanes property was "property of the bankruptcy estate" of Shearn Moody, Jr., as that term is hereafter defined for you, and *was not property held in trust for the benefit of others.*

(Emphasis added.) Furthermore, prior to giving the instruction in issue, the court charged the jury that "even previously disclosed property can be concealed if the defendant conceals the ultimate disposition of the property or proceeds derived from the property." And, immediately after giving the instruction in issue, the court charged the jury as follows:

> Whether property belongs to the bankruptcy estate is not necessarily to be determined with reference to the schedules filed by debtor. Whether or not an item of property is scheduled by a debtor is not controlling, and the fact that an item of property is scheduled by a debtor does not necessarily mean that such property is "property belonging to the bankruptcy estate" of a debtor. You may, however, consider the fact that the asset was so listed along with

other evidence in determining both the character of the asset as well as the intent of the defendants.

Closing arguments were consistent with the above. They centered on whether the interest in Seaside Lanes was part of the 1980 Trust, whether that trust was a sham, and whether, in any event, Moody believed that it was a valid trust.[9]

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[9] During closing arguments, presented before the jury was charged, a spendthrift trust was referred to at least twice. The government stated:

> All this [claimed protected by the 1980 Trust] was spent on houseboys, landscaping, so forth. This was no trust purpose, this was to benefit Shearn Moody personally.
>
> Which brings us to another thing, I think the court will instruct you that while property which is placed in trust for the benefit of another person is not part of a bankruptcy estate, in essence, the court is going to tell you it has to be a valid trust. And if it's not a valid spendthrift trust, it's still part of the bankruptcy estate.
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> You know all of this benefitted Mr. Moody personally. You also know that Mr. Moody had the power to amend that trust at any time, he could have done with it whatever he wanted. It was just another one of his little roadblocks to try to throw upon in order to cheat, in order to avoid his obligations under the law.

There was no objection to the comment about a spendthrift trust. Revie's counsel commented on one of Moody's claimed spendthrift trusts, but not the 1980 Trust, concerning payments of fees to Moody's bankruptcy attorney, Ford, on whom Revie's attorney placed blame for the bankruptcy errors, as discussed *infra* in Part II E.:

> I hope you will look at that letter and say, this woman [Ford] from the very beginning was determined to resist and obstruct and delay the final disposition of this bankruptcy proceeding, for a very good reason, a very good reason.
>
> I think the same day Jane Ford wrote the letter . . . she files a statement required by law, . . . telling the bankruptcy court I'm going to get some more money and this money is . . . not property of the bankruptcy estate, it is indeed a spendthrift

Pursuant to the standard for plain error, and when the challenged instruction is viewed under the proper standard—in the context of the trial as a whole, there was no plain error.

C.

Moody contends also that the indictment violated his Fifth and Sixth Amendment rights to be informed of the nature of the charges against him, primarily on the ground that the charge in both Counts that he "concealed" the proceeds, without pleading more specific facts, "left the prosecution free to roam" among everchanging theories of concealment and makes it impossible for this court to determine if Moody was convicted for the same conduct for which he was indicted (quoting *Russell v. United States*, 369 U.S. 749, 768, 82 S.Ct. 1038, 1049, 8 L.Ed.2d 240 (1962); that the indictment "fail[ed] to define the words 'concealed' or 'transferred' or to provide any facts which would clarify their meaning in the indictment." However, "[a]n indictment for a violation of . . . [§]152 need not allege evidentiary facts showing the manner of the concealment." *United States v. Vanderberg*, 358 F.2d 6, 10 (7th Cir.1966).

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trust and other property not property of the debtor's estate, specifically the Shearn Moody Holding Corporation funds.

Now, Jane Ford was taking the position that the Shearn Moody Holding Company distributions, those are the distributions from Trust '57 that you recall that weren't property of the bankruptcy estate and she was entitled to be paid from those funds.

And, Moody's counsel stated in his closing:

I expect [the court] will [instruct] you that one of the essential elements of this offense that the government must prove beyond a reasonable doubt . . . is [that] Shearn Moody, Jr. knew at the time of the alleged knowing fraudulent concealment that the approximately $201,000 from the sale of the Seaside Lanes property was property of the bankruptcy estate of Shearn Moody, Jr. as that term is hereafter defined for you and . . . was not property held in trust for the benefit of others.

An indictment is sufficient if it (1) contains the elements of the offense charged; (2) fairly informs the defendant of the charges he must prepare to meet; and (3) enables a defendant to plead an acquittal or a conviction in bar to future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *United States v. De La Rosa*, 911 F.2d 985, 988-89 (5th Cir.1990). It is generally sufficient "when the charge tracks the governing statute as long as the statutory language unambiguously sets forth all essential elements." *United States v. Beebe*, 792 F.2d 1363, 1366 (5th Cir.1986). And it need not set out the "evidentiary details by which the government plans to establish" the defendant's guilt, *United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir.1986); but if the statute defines the offense in "generic terms," the indictment "must descend to particulars." *Russell*, 369 U.S. at 765, 82 S.Ct. at 1047; *Beebe*, 792 F.2d at 1366.

The Counts were consistent with the language of the subsections under which Moody was indicted. As discussed above, compare § 152 ¶ 1 (proscribing concealment of "any property belonging to the estate of a debtor") with § 152 ¶ 7 (proscribing fraudulent transfer or concealment by debtor of "any of his property"). In addition, both set the time frame for the alleged concealment as beginning on December 24, 1984—the day Moody withdrew the $201,000. Concealment is a continuing offense, *United States v. Arge*, 418 F.2d 721, 724 (10th Cir.1969), and may be proven by evidence establishing an ongoing course of conduct. The government was not obligated to allege the specific "evidentiary details." *Gordon*, 780 F.2d at 1172. In addition, Count 1 contained the other necessary elements: (1) that the property concealed, which was the property of the estate, was $201,000 which came from the Seaside Lanes partnership; (2) that the property was concealed from the bankruptcy trustees, among others; (3) that it was so concealed in Houston and elsewhere from December 24, 1984 onward;

and (4) that Moody acted knowingly and frauduently. The second Count alleged the necessary elements to charge a crime under ¶ 7 and likewise stated the other essential elements of the offense.

Accordingly, we find that the indictment was sufficient.

D.

Moody contends also that the denial of a bill of particulars, under Fed.R.Crim.P. 7(f), constituted reversible error. We review such "denial . . . under an abuse of discretion standard." *United States v. Marrero*, 904 F.2d 251, 258 (5th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 561, 112 L.Ed.2d 567 (1990). The ruling is reversible only if the defendant establishes "actual surprise at trial and demonstrate[s] prejudice to his substantial rights." *Id.* Moody contends that he did.

A bill of particulars is not required if a defendant is otherwise provided, *inter alia*, with sufficient information to enable him to prepare his defense and avoid surprise. *See United States v. Levergne*, 805 F.2d 517, 521 (5th Cir.1986); *Marrero*, 904 F.2d at 258. Accordingly, the criteria for the sufficiency of an indictment and for whether a district court erred (abused its discretion) in denying a bill of particulars are very similar. *Beebe*, 792 F.2d at 1366-67 ("Because the indictment was sufficient, the district court did not abuse its discretion when it denied appellants' request for a bill of particulars.") (footnote omitted).

As discussed, the indictment was sufficient. Furthermore, we do not find the requisite surprise and prejudice.[10] Accordingly, the denial was not an abuse of discretion.

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[10] Another factor, which we need not address, is that Moody did not use the discovery available to him under Fed.R.Crim.P. 16. *See United States v. Vasquez*, 867 F.2d 872, 874 (5th Cir. 1989).

E.

Moody's final contention is that the district court committed reversible error in admitting testimony from Moody's bankruptcy attorney, Ford, that Moody had not objected to her listing in the petitions both Seaside Lanes and the 1980 Trust as assets of the bankruptcy estate. Among other grounds, Moody argues that such non-communication between an attorney and client is, under certain circumstances, a privileged communication.

In federal criminal proceedings, the attorney-client privilege is applied pursuant to Federal Rule of Evidence 501. As with other rulings on evidence, even if a ruling on the privilege is erroneous (an abuse of discretion), it is not reversible "unless a substantial right of the party is affected. . . ." Fed.R.Evid. 103(a)(1); Fed.R. Crim.Proc. 52(a); *Moody*, 903 F.2d at 326 (evidentiary rulings reviewed "only for abuse of . . . discretion"; if a ruling constitutes such abuse, it is then reviewed for harmless error); *United States v. Jiminez Lopez*, 873 F.2d 769, 771 (5th Cir.1989). "[T]he test for harmless error in this context is 'whether the trier of fact would have found the defendant guilty beyond a reasonable doubt with the . . . [contested] evidence [excluded]'." *United States v. Gomez*, 900 F.2d 43, 45 (5th Cir.1990) (quotations omitted); *Moody*, 903 F.2d at 329.

However, it is not necessary to determine whether such non-communication was privileged, because of Moody's arguable use of communications with Ford as a "sword" and his failure to object to testimony similar, if not identical, to that in issue. As held in *United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir.1970) (en banc), *cert. denied*, 403 U.S. 933, 91 S.Ct. 2262, 29 L.Ed.2d 712 (1971) (quotation omitted), " 'the privilege . . . is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.' " In addition, the privilege can, of course, be relinquished or

lost if privileged communications are admitted without objection. *See, e.g., United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir.1982), *cert. denied*, 466 U.S. 944, 104 S.Ct. 1927, 80 L.Ed.2d 473 (1984).

As stated, the Texas and North Carolina petitions included as assets of the bankruptcy estate Moody's interest in the Seaside Lanes partnership, with a value of $120,000, and his "Interest in 1980 Trust," with a value of $0.00. Beside his signature on both petitions, Moody wrote that the information contained in them had been provided by his attorney, among others, and that he reserved the right to amend.

At the start of trial, Moody invoked the attorney-client privilege for Ford. Thereafter, when he ran out of time in his opening statement, Moody's counsel stated that Revie's would present certain information during his opening.[11] Revie's attorney then proceeded, *inter alia*, to attack Ford, stating, among other things, that she "bungled and botched Mr. Moody['s] bankruptcy from beginning to end"; that Ford told Revie to "put . . . every conceivable interest that Shearn Moody may have in property [on the schedule] . . . and we will let the bankruptcy sort it out later"; and that "the scheduling of the property resulted essentially from . . . Ford's decision to put it in, not . . . Revie's, not . . . Moody['s] . . ., and, in fact, as you are going to see, as the bankruptcy progressed, [Moody] had no earthly idea what was going on in this case for the most part other than what he was told by . . . Revie." There was no objection by Moody's attorney, even though, *inter alia*, it is arguable that communications between Ford and Revie, Moody's employee acting for Moody, were privileged. *See, e.g., Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir.1985). At the very least, based upon the opening statement, the privilege was arguably being

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[11] Defendants' counsel worked closely together throughout the proceeding.

used as a sword. And, as reflected in part in note 9, *supra*, the attacks by Revie's and Moody's attorneys continued during their cross-examination of Ford and closing arguments.

It is also arguable that the privilege was lost during Ford's testimony, prior to the contested testimony, when, concerning listing the partnership on the petition, she responded "no", without objection, when asked by the government whether "at any time did Mr. Moody object to your handling Seaside Lanes in this manner." Furthermore, shortly before, Moody did not object when Ford also responded "no" when asked whether "at any time did Mr. Moody instruct you that you had incorrectly filled out the bankruptcy petition." It was not until later, when Ford was asked whether, after refiling in North Carolina, Moody told her that she had incorrectly described Seaside Lanes as part of the estate, that Moody's counsel objected. The court denied the objection. By then, the information sought had already been twice presented without objection. Later, and over objection, the court allowed Ford to answer ("no"), when asked if she had been told "by anyone" that Seaside Lanes or the 1980 Trust had been incorrectly listed as an asset of the bankruptcy estate.[12]

At the very least, even assuming that the contested testimony was privileged, it is arguable that there was no

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[12] The court sustained a similar objection. After opining both that the 1980 Trust was revocable and that it was therefore an asset of the bankruptcy estate, Ford answered "yes" when asked whether she had communicated that opinion to Moody and Revie. Moody's attorney objected on the basis of the privilege; and after an extended colloquy outside the presence of the jury, the court sustained the objection, but denied Moody's motion for a mistrial. Because of concerns by Moody's counsel that an explanation of the ruling to the jury would underscore the harm that he felt had been done, he asked the court to only instruct the jury that the objection had been sustained, which was the procedure followed by the court.

error ("abuse of discretion"), because of Moody's use of the privilege as a sword and the admission, without objection, of testimony similar to that claimed privileged. However, it is not necessary to decide whether there was error, because, as stated, more than error is required; a substantial right must be affected. Even assuming error, we find, in light of the other evidence, and the attacks on Ford, and the admission, without objection, of communications between her and Moody, that a substantial right was not affected; we find that Moody would have been found guilty beyond a reasonable doubt even if the evidence in issue had been excluded. Therefore, even if there was error, it is not reversible.

III.

Accordingly, the convictions on both Counts are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6271

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
SHEARN MOODY, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 01-25-91, 5 Cir., 199 , —— F.2d ——)

(Filed Mar. 12, 1991)

Before RUBIN, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Barksdale
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-86-323-S

UNITED STATES OF AMERICA

v.

SHEARN MOODY, JR. and NORMAN REVIE,
Defendants.

PARTIAL SUPERSEDING INDICTMENT

[Filed Apr. 13, 1989]

THE GRAND JURY CHARGES:

SUPERSEDING COUNT FOURTEEN

1. On or about June 6, 1983, SHEARN MOODY, JR., defendant herein, voluntarily filed a bankruptcy petition in the United States Bankruptcy Court for the Southern District of Texas seeking protection from his creditors.

2. On or about November 13, 1983, SHEARN MOODY, JR. filed another bankruptcy petition in the United States Bankruptcy Court for the Middle District of North Carolina, again seeking protection from his creditors, following his dismissal on or about November 10, 1983 of the bankruptcy petition that had been filed in the Southern District of Texas.

3. On or about October 26, 1984, John E. Peterson was appointed by the United States Bankruptcy Court as

Trustee for the bankruptcy estate of SHEARN MOODY, JR., and he was charged by the court with custody and control of the debtor SHEARN MOODY, JR.'s property.

4. On or about January 30, 1985, the bankruptcy proceeding concerning the debtor, SHEARN MOODY, JR., was transferred from the Middle District of North Carolina to the Southern District of Texas.

5. On or about March 13, 1985, W. Steve Smith was appointed by the United States Bankruptcy Court as Trustee for the bankruptcy estate of SHEARN MOODY, JR., and he was charged by the court with custody and control of the debtor SHEARN MOODY, JR.'s property.

6. From on or about December 24, 1984 and continuing until the date of this indictment, at Houston, in the Southern District of Texas and elsewhere, SHEARN MOODY, JR. and NORMAN REVIE, defendants herein, did knowingly and fraudulently conceal from a custodian, trustee, marshal, and other officer of the court charged with the control and custody of property, and from creditors, in a case under title 11, property belonging to the estate of the debtor SHEARN MOODY, JR., in that SHEARN MOODY, JR. and NORMAN REVIE concealed approximately $201,000.00 which was property belonging to the estate of the debtor SHEARN MOODY, JR.

(Violation: Title 18, United States Code, Section 152 and 2).

SUPERSEDING COUNT FIFTEEN

1. The grand jury realleges all of the allegations of paragraphs one thorugh 5 of Superseding Count Fourteen of this indictment and incorporates them by reference.

2. From on or about December 24, 1984 and continuing until the date of this indictment, at Houston, in the Southern District of Texas and elsewhere, SHEARN MOODY, JR., individually, and NORMAN REVIE, act-

ing as agent for SHEARN MOODY, JR., both defendants herein, did with intent to defeat the provisions of title 11, knowingly and fraudulently transfer and conceal property of the debtor, SHEARN MOODY, JR., in that SHEARN MOODY, JR. and NORMAN REVIE transferred and concealed approximately $201,000.00 from the Seaside Lanes Partnership.

(Violation: Title 18, United States Code, Section 152 and 2).

A TRUE BILL

/s/ Pat Willheim
Foreman of the Grand Jury

HENRY K. ONCKEN
United States Attorney

By: /s/ Mitchell B. Lansden
MITCHELL B. LANSDEN
Assistant U.S. Attorney

APPENDIX D

STATUTES INVOLVED

§ 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11; or

Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, in or in relation to any case under title 11; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under title 11; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case

under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulentiy transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information, including books, documents, records, and papers relating to the property or financial affairs of a debtor; or

Whoever, after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court entitled to its possession, any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended June 12, 1960, Pub.L. 86-519, § 2, 74 Stat. 217; Sept. 2, 1960, Pub.L. 86-701, 74 Stat. 753; Oct. 18, 1976, Pub.L. 94-550, § 4, 90 Stat. 2535; Nov. 6, 1978, Pub.L. 95-598, Title III, § 314(a), (c), 92 Stat. 2676; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7017, 102 Stat. 4395.)

SUBCHAPTER III—THE ESTATE

§ 541. Property of the estate

(a) The commencement of a case under [1] section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

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[1] So in original.

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real

property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) The estate shall have the benefit of any defense available to the debtor as against an entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2594.

APPENDIX E

LEGISLATIVE HISTORY

SIXTY-NINTH CONGRESS. SESS. I. CH. 406. 1926

SEC. 11. That section 29 (a), (b), and (d) of said Act, as so amended, be, and the same hereby is, amended to read as follows, and that section 29 be further amended by adding after paragraph (d) thereof a new paragraph (e) to read as follows:

"(a) A person shall be punished by imprisonment for a period of not to exceed five years upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee, receiver, custodian, or other officer of the court.

"(b) A person shall be punished by imprisonment for a period of not to exceed five years upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, trustee, United States marshal, or other officer of the court charged with the control or custody of property, or from creditors in composition cases, any property belonging to the estate of a bankrupt; or (2) made a false oath or account in, or in relation to any proceeding in bankruptcy; or (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition with intent to defeat this Act; or (5) received or attempted to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof from any person, for acting or forbearing to act in bankruptcy proceedings; or (6) having been an officer or

agent of any person or corporation, and in contemplation of the bankruptcy of such person or corporation, or with intent to defeat the operation of this Act, concealed or transferred any of the property of the debtor; or (7) after the filing of the petition, or, in contemplation of bankruptcy, concealed, destroyed, mutilated, or falsified any book, document, or record affecting or relating to the property or affairs of a bankrupt; or (8) after the filing of the petition, withheld from the receiver or trustee any book, document, or paper affecting or relating to the property or affairs of a bankrupt, to the possession of which he is entitled.

BANKRUPTCY—CONCEALED ASSETS

For text of Act see p. 1102

Senate Report No. 974, Sept. 8, 1960
[To accompany H.R. 5747]

House Report No. 345, May 7, 1960
[To accompany H.R. 5747]

The Senate Report is set out.

Senate Report No. 974

The Committee on the Judiciary, to which was referred the bill (H.R. 5747) to amend section 152, title 18, United States Code, with respect to the concealment of assets in contemplation of bankruptcy, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to provide that individuals who knowingly and fraudulently transfer or conceal their property in contemplation of their own bankruptcy shall be held to the same degree of accountability as the law now provides for agents and officers of potential bankrupts.

STATEMENT

The proposed legislation has been requested by the Attorney General.

The proposed legislation has been recommended favorably by the Administrative Office of the U.S. Courts.

The first paragraph of section 151 of title 18, United States Code, now subjects to prosecution—

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or

> other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt.

The law is well established that in such a prosecution the Government must prove that the assets were concealed after the appointment of a trustee or receiver.

The sixth paragraph of section 152 of title 18, United States Code, now subjects to prosecution—

> Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation.

Thus a higher degree of accountability is required of agents and officers, who are subject to prosecution for the concealment of assets in contemplation of bankruptcy, than is now required of individuals, who are not subject to prosecution for the concealment of assets in contemplation of their own bankruptcy.

The proposed legislation is designed to make individuals who conceal or transfer assets in contemplation of their own bankruptcy subject to the same prosecution as is now provided for agents or officers.

The committee believes that the proposed legislation, as requested by the Department of Justice, is meritorious and recommends it favorably.

Attached and made a part of this report are (1) letter dated March 9, 1959, from the Attorney General; and (2) a letter dated June 26, 1958, from the Administrative Office of the U. S. Courts on a related bill of the 85th Congress, S. 3878; the changes proposed in S. 3878 of the 85th Congress by the letter from the Administrative

Office of the U. S. Courts have been incorporated in H.R. 5747 of the 86th Congress.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., March 9, 1959.

The VICE PRESIDENT,
U.S. Senate, Washington, D.C.

DEAR MR. VICE PRESIDENT: The Department of Justice recommends the amendment of section 152 of title 18, United States Code, relating to the concealment of assets in bankruptcy matters.

Paragraph 1 of section 152 subjects bankrupts to prosecution for the concealment of assets. However, the law is well established that in such a prosecution the Government must prove that the assets were concealed after the appointment of a trustee or receiver.

On the other hand, paragraph 6 of the section prohibits officers and agents of potential bankrupts from concealing the assets of such persons or corporations in contemplation of bankruptcy—before the appointment of a trustee or receiver.

It would seem that individuals who dispose of their property in contemplation of their own bankruptcy should be held to the same degree of accountability as agents or officers of others who are potential bankrupts.

The attached draft legislation would strengthen the statute while removing the inequity now inherent in it. Your consideration and appropriate reference of the proposal is requested.

The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

Sincerely,

WILLIAM P. ROGERS,
Attorney General.

ADMINISTRATIVE OFFICE OF THE
U. S. COURTS,
Washington, D. C., June 26, 1958.

Senator JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This is in reply to your letter of June 25, 1958, inquiring about the bill, S. 3878, which is pending before the Judiciary Committee of the Senate. The bill would amend the criminal law relating to the concealment of assets in bankruptcy cases.

The purpose of the proposed amendment is to provide that individuals who conceal their property in contemplation of their own bankruptcy will be held accountable. Under the present law the Government must prove that assets were concealed by the bankrupt after the petition in bankruptcy is filed; in contrast, agents and officers of the bankrupt are chargeable for concealment of assets in contemplation of bankruptcy.

The sixth paragraph of section 152, title 18 of the United States Code now reads as follows:

"Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or".

Penalties of a fine up to $5,000 or imprisonment for 5 years are provided.

The bill would strike the words "while an agent or officer of any person or corporation, and". It would also change the first word "such" to "any".

As thus amended by the bill as proposed, the paragraph would read:

"Whoever, in contemplation of a bankruptcy proceeding by or against any person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or".

A bill, H.R. 10599, which is identical to S. 3878 was considered by the Judicial Conference of the United States at its meeting on March 18, 1958, and the Conference recommended the enactment of the bill, with, however, a clarifying amendment making the bill read as follows:

"Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against any person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or". (Conference report March 1958 session, p. 20.)

H.R. 10599 is now pending before the House Judiciary Committee for consideration.

Sincerely yours,

WARREN OLNEY III, *Director.*

Supreme Court, U.S.
FILED
AUG 19 1991
OFFICE OF THE CLERK

No. 90-1932

In the Supreme Court of the United States

OCTOBER TERM, 1991

SHEARN MOODY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether ¶ 7 of 18 U.S.C. 152, which prohibits the fraudulent concealment or transfer of property "in contemplation of a case under title 11 * * *, or with intent to defeat the provisions of title 11," applies only to conduct carried out "in contemplation of a case under title 11."

2. Whether, based on petitioner's fraudulent transfer and concealment of property in which he had an interest, petitioner was properly convicted of fraudulently concealing "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 and of fraudulently transferring and concealing "his property" under 18 U.S.C. 152 ¶ 7.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 923 F.2d 341.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1991. A petition for rehearing was denied on March 12, 1991. Pet. App. 24a. The petition for a writ of certiorari was filed on June 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts of bankruptcy fraud. He was convicted of fraudulently concealing property belonging to the estate of a debtor, in violation of 18 U.S.C. 152 ¶ 1, and fraudulently transferring and concealing his property, in violation of 18 U.S.C. 152 ¶ 7. He was sentenced to concurrent five-year terms of imprisonment and fined $5000 on each count. The court of appeals affirmed. Pet. App. 1a-23a.

1. In June 1983, petitioner filed a petition for relief under the Bankruptcy Code (11 U.S.C.). In the bankruptcy petition, petitioner listed as an asset his interest in the Seaside Lanes partnership. The partnership consisted of petitioner, his mother, and his brother, Robert Moody. They had formed the partnership to own and manage properties that they held individually or as beneficiaries of trusts created for them by petitioner's father. Among those properties was a bowling alley. Pet. App. 2a.

In June 1984, the partnership sold the bowling alley for approximately $500,000 and invested the proceeds in a certificate of deposit at the Moody National Bank. After learning of the sale, petitioner's attorney told Robert Moody, chairman of the board of the bank, that the certificate of deposit belonged to petitioner's bankruptcy estate and that the proceeds of the certificate could not be disbursed without an order from the bankruptcy court. When the certificate matured in December 1984, however, Robert Moody wired the proceeds to the partnership's account at another bank. Three days later, petitioner wrote three checks on the account totalling $201,000, which he then converted to cashiers checks in smaller denom-

inations. Petitioner cashed the checks over the next several months. Pet. App. 2a-4a.

Petitioner did not disclose to the bankruptcy trustee that he had taken money from the partnership account until he was deposed in the bankruptcy case in July 1985. A superseding indictment charging petitioner with one count of violating 18 U.S.C. 152 ¶ 1 and one count of violating 18 U.S.C. 152 ¶ 7 was filed in the Southern District of Texas in April 1989, and petitioner was convicted on both counts. Pet. App. 4a-5a.[1]

2. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-23a. The court of appeals rejected petitioner's argument that 18 U.S.C. 152 ¶ 7 applies only to conduct that occurs before a petition for bankruptcy is filed.[2] The court observed that ¶ 7 prohibits concealment or transfer of assets "in contemplation of a case under title 11 . . ., *or with intent to defeat the provisions of title 11*." Pet. App. 9a. Because of this disjunctive structure, the court reasoned, the provision was not limited to conduct carried out "in contemplation of a case under title 11," as petitioner had argued. *Id.* at 10a. The court noted that its interpretation was supported by prior decisions upholding convictions under ¶ 7 based on post-petition con-

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[1] The bankruptcy fraud charges were severed from another indictment that charged petitioner and a co-defendant with thirteen counts of mail and wire fraud. Pet. App. 4a & n.2.

[2] 18 U.S.C. 152 ¶ 7 provides:

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation [shall be fined or imprisoned, or both].

duct. *Id.* at 10a-11a (citing *United States* v. *Parkhill*, 775 F.2d 612 (5th Cir. 1985) and *United States* v. *Turner*, 725 F.2d 1154 (8th Cir. 1984)).

The court also rejected petitioner's argument that the two counts in the indictment were "factually repugnant." Pet. App. 6a. Petitioner had argued that his withdrawal of money from the Seaside Lanes partnership account could not be both a fraudulent concealment of "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 and a fraudulent concealment or transfer of "his property" under 18 U.S.C. 152 ¶ 7.[3] The court observed that petitioner's argument depended on a distinction between "property of the estate" and "property of the debtor" that was not reflected in the statute. Pet. App. 8a-9a. Paragraph 7, the court noted, "does not use the term 'property of the debtor.'" *Id.* at 10a. The court accordingly refused to "give the plain wording and meaning of ¶ [7] the strained, hypertechnical reading urged by [petitioner]." *Ibid.*

ARGUMENT

1. Petitioner renews his contention that 18 U.S.C. 152 ¶ 7 does not apply to conduct that occurs after a bankruptcy case commences. The court of appeals correctly rejected that contention.

As the court of appeals concluded, the plain language of ¶ 7 defeats petitioner's contention. Pet. App.

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[3] 18 U.S.C. 152 ¶ 7 is set forth at note 2, *supra*. 18 U.S.C. 152 ¶ 1 provides:

> Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor [shall be fined or imprisoned, or both].

10a. Paragraph 7 applies when assets are fraudulently concealed or transferred "in contemplation of a case under title 11 * * *, *or* with intent to defeat the provisions of title 11." 18 U.S.C. 152 ¶ 7 (emphasis added). The disjunctive connector, "or," means that a violation of ¶ 7 may be proven either by proof that the defendant acted "in contemplation of a case under title 11" *or* by proof that he acted "with intent to defeat the provisions of title 11." See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 73 (1984); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739-740 (1978). That the two phrases are to be construed independently is reinforced by the comma separating them. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

Petitioner argues that the disjunctive language of ¶ 7 should be ignored because the legislative history supports a "conjunctive reading." Pet. 10. This Court has consistently rejected the notion that legislative history can be used to overcome the plain language of a statute. *E.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 928 (1991); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985). In construing the Bankruptcy Code, the Court has stated that "where * * * the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). That statement applies with full force in this case.[4]

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[4] Petitioner cites *McNally* v. *United States*, 483 U.S. 350 (1987), as a case in which disjunctive statutory language was read conjunctively. *McNally* is inapposite here. In *McNally*, the Court held that the mail fraud statute did not apply to fraudulent schemes involving intangible rights, such as the right to honest government. The Court determined that, although dis-

In any event, the legislative history does not support petitioner's argument. What is now ¶ 7 was added to the bankruptcy fraud statute in 1926; the 1926 provision had the same disjunctive structure as the current provision.[5] Petitioner does not cite anything in the legislative history of the 1926 provision suggesting that—contrary to its plain language—it was meant to be read conjunctively.[6]

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junctive language in the statute arguably supported a contrary reading, the statute as a whole was ambiguous. *Id.* at 358-360. To resolve that ambiguity, the Court resorted to the legislative history of the statute and to the rule of lenity. *Id.* at 356-360. As discussed in the text, resort to legislative history is unwarranted here because the statutory language is clear. So is resort to the rule of lenity, contrary to petitioner's contention (Pet. 9). See, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990). *McNally* is inapposite for another reason. The Court's interpretation in *McNally* was influenced by the fact that a contrary interpretation would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 360. No similar federalism concerns are implicated in this case.

[5] The 1926 version of ¶ 7 authorized a fine and term of imprisonment for any person who "knowingly and fraudulently * * * having been an officer or agent of any person or corporation, and in contemplation of the bankruptcy of such person or corporation, or with intent to defeat the operation of this Act, concealed or transferred any of the property of the debtor." Act of May 27, 1926, ch. 406, § 11, 44 Stat. 665. The report accompanying the legislation stated that the purpose of the amendment was "to reach behind a corporate entity in order to get at the one directly responsible for the wrongdoing." H.R. Rep. No. 877, 69th Cong., 1st Sess. 10 (1926).

[6] What is now ¶ 8 of 18 U.S.C. 152 was added at the same time as the provision that is now ¶ 7. Both of the 1926 provisions are substantially similar to the current provisions. As in the current statute, the 1926 version of ¶ 7 prohibited the fraudulent transfer or concealment of *property*, whereas the 1926 version of ¶ 8 prohibited the fraudulent concealment or transfer

Lacking contemporaneous legislative history that supports his interpretation, petitioner resorts to pre-enactment and post-enactment materials. Petitioner relies, first, on a committee report statement from 1924 concerning what is now 18 U.S.C. 153. Pet. 9 (quoting S. Rep. No. 774, 68th Cong., 1st Sess. 5 (1924)). That statement plainly has no bearing on the meaning of ¶ 7 of 18 U.S.C. 152.[7] Petitioner also relies

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of *documents* associated with a debtor's estate. The latter provision applied to conduct that occurred "after the filing of the petition, or, in contemplation of bankruptcy." Act of May 27, 1926, ch. 406, § 11, 44 Stat. 665. The similar language, structure, and subject matter of these two provisions suggest that Congress intended them to be similar in scope. Moreover, it seems unlikely that Congress intended to afford greater protection to documents than to property. Since the provision concerning documents plainly applies to both pre-petition and post-petition conduct, the provision concerning property should be construed also to apply to pre- and post-petition conduct.

[7] The committee report statement quoted by petitioner concerned an amendment to what is now 18 U.S.C. 153. The prior law had prohibited trustees from embezzling property of the estate. See Act of July 1, 1898, ch. 541, § 29a, 30 Stat. 554. The 1926 amendment extended this prohibition to apply not only to a trustee but also to a "receiver, custodian or other officer of the court." The purpose of the amendment was, as stated in the passage quoted by petitioner, "to guard against embezzlement of bankrupt estates before trustees have been appointed and qualified." S. Rep. No 774, 68th Cong., 1st Sess. 5 (1924). The 1924 legislation also amended what is now ¶ 1 of 18 U.S.C. 152. The prior law had prohibited a person's fraudulently concealing "from his trustee any of the property belonging to his estate in bankruptcy." Act of July 1, 1898, ch. 541, § 29b, 30 Stat. 554. The proposed amendment punished the fraudulent concealment of "any property belonging to the estate of a bankrupt." The report suggests that the purpose of this amendment, like the first amendment described above, was to reach concealment that occurred after the bankruptcy case commenced but before a trustee was appointed. S. Rep. No. 774, *supra*, at 5.

(Pet. 10) on a letter from the Attorney General written 35 years after the language at issue here was enacted. Here, too, petitioner's reliance is misplaced.[8] In roaming so far afield to find support for his interpretation of 18 U.S.C. 152 ¶ 7, petitioner succeeds only in demonstrating the lack of support for his reading.

Finally, petitioner's interpretation of ¶ 7 has no support in the case law. As the court of appeals recognized (Pet. App. 10a-11a), several other courts of appeals have upheld convictions under ¶ 7 based on post-petition conduct. See, *e.g.*, *United States* v. *Goodstein*, 883 F.2d 1362, 1363, 1365-1366 & n.1 (7th Cir. 1989), cert. denied, 110 S. Ct. 1305 (1990); *United States* v. *Parkhill*, 775 F.2d 612, 613-614 & n.3 (5th Cir. 1985); *United States* v. *Turner*, 725 F.2d 1154, 1156 (8th Cir. 1984).[9]

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[8] Neither the Attorney General's letter nor other legislative history concerning the 1960 amendment to what is now ¶ 7 supports petitioner's interpretation. The 1960 legislation amended the 1926 version of ¶ 7, note 5, *supra*, so that it no longer reached only persons acting as officers or agents of potential debtors but also potential debtors acting on their own behalf. Act of Sept. 2, 1960, Pub. L. No. 86-701, 74 Stat. 753. The committee report on the 1960 amendment stated that under prior law agents and officers had been subject to a "higher degree of accountability" than potential debtors, who could only be punished for post-petition conduct under what is now ¶ 1 of 18 U.S.C. 152. S. Rep. No. 974, 86th Cong., 1st Sess. 2 (1959). The statement in the report only makes sense if under prior law agents and officers could be punished for *both* pre-petition *and* post-petition conduct. If, as petitioner contends, the 1926 version of ¶ 7 punished agents and officers only for pre-petition conduct, they would have been subjected to a *different*, not a *higher*, accountability as compared to potential debtors.

[9] Moreover, in a case involving pre-petition conduct, the Fifth Circuit recognized that a charge under 18 U.S.C. 152 ¶ 7 may be "proved disjunctively" by showing that the defendant

2. Petitioner also renews his contention (Pet. 12-15) that the charges on which he was convicted were factually inconsistent. The court of appeals correctly concluded that "there is no inconsistency." Pet. App. 9a.

Petitioner argues that the proceeds that he withdrew from the Seaside Lanes partnership account cannot be both "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 and "his property" under 18 U.S.C. 152 ¶ 7. Petitioner asserts (Pet. 14) that the term "his property" in ¶ 7 refers to "property of the debtor," as the latter term is used in the Bankruptcy Code. Under the Code, his argument runs (Pet. 11), all "property of the debtor" becomes "property of the estate" upon the filing of a bankruptcy petition, and the two terms are thus mutually exclusive.

The court of appeals correctly identified the fundamental flaw in petitioner's argument: It is premised on a distinction that the statute at issue does not contain. See Pet. App. 7a, 10a. Paragraphs 1 and 7 of 18 U.S.C. 152 do not employ the terms "property of the estate" and "property of the debtor." Thus, petitioner's assertion that those terms are mutually exclusive, even if correct, would shed no light on the meaning of the different terms used in 18 U.S.C. 152. The court of appeals properly refused to ignore the language that Congress enacted to accommodate petitioner's "hypertechnical reading." Pet. App. 10a.

Moreover, petitioner misconceives the significance of filing a bankruptcy petition. The filing of a petition does not automatically extinguish a debtor's interest

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acted "in contemplation of bankruptcy *or* with intent to defeat the bankruptcy laws." *United States* v. *Haymes*, 610 F.2d 309, 310 (5th Cir. 1980).

in his property and transform that property into "property of the estate." Some property in which the debtor has an interest becomes property of the estate through recovery actions brought by the trustee after the petition is filed. See 11 U.S.C. 541(a)(3) (defining "property of the estate" to include "[a]ny interest in property that the trustee recovers under [enumerated provisions]"); see also 11 U.S.C. 542-550 (authorizing trustee to avoid certain transfers of debtor's property and to recover that property for the benefit of the estate). By the same token, the debtor does not lose all interest in his property when that property passes into the estate. For example, the debtor retains an interest in his property for purposes of exempting that property from the reach of creditors. See 11 U.S.C. 522.

The filing of a bankruptcy petition begins the process of adjusting a debtor's rights in property as against the rights of his creditors. The creation of the bankruptcy estate at the time of filing is only the first step in that process. By defining the "property of the estate" primarily in terms of the property in which the debtor has an interest, the Code forces creditors to assert their claims to the debtor's property by participating in the bankruptcy proceeding. See 11 U.S.C. 362 (automatic stay). In sum, the filing of a petition draws a line between the debtor's interests in property and those of his creditors, and not, as petitioner asserts, between the debtor's interests and those of the estate. See Pet. App. 6a (the Bankruptcy Reform Act of 1978 "was intended to create a more uniform and comprehensive scope to 'property of the estate' which is subject to the reach of debtors' creditors than had previously existed"), quoting *Goff* v. *Taylor*, 706

F.2d 574, 578 (5th Cir. 1983). See also *Begier* v. *Internal Revenue Serv.*, 110 S. Ct. 2258, 2265 (1990).[10]

Because the Code focuses on the relationship between a debtor and his creditors rather than on that between the debtor and the estate, the Code does not always distinguish between "property of the debtor" and "property of the estate." For example, Section 543(a) of the Code prohibits a custodian who possesses any "property of the estate" or "property of the debtor" from disposing of that property after a bankruptcy case commences. 11 U.S.C. 543(a). Under Section 543(b), the custodian must deliver any "property of the debtor" in his possession to the trustee. 11 U.S.C. 543(b). It would make no sense to interpret Section 543(b) to require the turnover of only that "property of the debtor" which is excluded from the estate. Accordingly, although Section 543(b) refers only to "property of the debtor," and not "property of the estate," "no one has suggested that there is any significant difference between those terms." 2 *Norton's Bankruptcy Law and Practice* § 29A:12, at 23 (1991); see also 4 *Collier on Bankruptcy* ¶ 543.01, at 543-545 n.11 (15th ed. 1990).

Nor is any such distinction made in the criminal provisions proscribing bankruptcy fraud. 18 U.S.C. 3284 provides:

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[10] Contrary to petitioner's suggestion (Pet. 7, 10), no unfairness results from construing 18 U.S.C. 152 ¶ 7 to prohibit a debtor from concealing assets that do not pass into the estate. A debtor's fraudulent transfer or concealment of his property hinders the administration of the estate whether or not the property becomes property of the estate. See *United States* v. *Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984) ("Even if the asset is not ultimately determined to be property of the estate * * *, Section 152 properly imposes sanctions on those who preempt a court's determination by failing to report the asset."), cert. denied, 471 U.S. 1014 (1985).

> The concealment of *assets of a debtor* in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

(Emphasis added.) Section 3284 applies to both pre-petition and post-petition concealment of a debtor's assets. See *Sultan* v. *United States*, 249 F.2d 385, 387 (5th Cir. 1957). Thus, the offense to which Section 3284 refers—"concealment of assets of a *debtor*"—includes concealment of property that has become "property belonging to the *estate*" within the meaning of ¶ 1 of 18 U.S.C. 152. See, *e.g.*, *United States* v. *Kaldenberg*, 429 F.2d 161, 163-164 (9th Cir.) (applying Section 3284 to post-petition concealment of debtor's assets), cert. denied, 400 U.S. 979 (1970); *United States* v. *Guglielmini*, 425 F.2d 439, 441-442 (2d Cir.) (same), cert. denied, 400 U.S. 820 (1970).[11]

In sum, for purposes of the bankruptcy fraud statutes, the assets of a debtor remain his assets after a bankruptcy petition has been filed. Just as "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 qualifies as the "assets of a debtor" under 18 U.S.C. 3284, so too "property belonging to the estate" under ¶ 1 may be "his property" under 18 U.S.C. 152 ¶ 7. Because the same property can fall within both ¶ 1 and ¶ 7, the

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[11] See also *United States* v. *Ivers*, 512 F.2d 121 (8th Cir. 1975). In *Ivers*, the court rejected an argument that an indictment charging the defendant with embezzling a check payable to the "bankrupt" failed to allege a violation of 18 U.S.C. 153, which prohibits embezzling property "belonging to the estate." 512 F.2d at 123-124. The *Ivers* court observed that "it is usual to speak of property of the bankrupt as synonymous with property of the estate in bankruptcy." *Id.* at 124.

court of appeals properly rejected petitioner's inconsistency argument.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] In the court of appeals, petitioner "carefully avoid[ed] asserting" that the charges against him under paragraphs 1 and 7 were multiplicitous, and the court of appeals accordingly did not consider that issue. Pet. App. 11a-12a. Similarly, in this Court petitioner expressly refrains from advancing an argument of multiplicitousness. Pet. 3 n.4.

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